



March 3, 2000

Ms. Belinda r. Perkins
Assistant General Counsel
Texas Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2000-0895

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133654.

The Teacher Retirement System of Texas (the “system”) received a request for information concerning the Texas Growth Fund’s (the “Growth Fund’s”) coinvestors and fellow board members in the 1994 investment in Technology Works. You inform our office that the system has released one responsive document reflecting the fund’s coinvestors to the requestor.¹ You claim, however, that the remaining responsive documents are excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted responsive documents.

Pursuant to section 552.305 of the Government Code, the system notified the Growth Fund of the request for an attorney general decision. The system did not present any arguments under section 552.110; rather, the system relied on the Growth Fund to make its own arguments against disclosure. The Growth Fund has not submitted to this office any arguments against disclosure. Consequently, because the third party failed to respond, we have no basis to conclude that the submitted documents are excepted under section 552.110. *See* Open Records Decision No. 552 (1990). The system also relied on the Growth Fund to make arguments under section 552.111. Because the Growth Fund made no such arguments, the submitted documents are not excepted under that section.

The primary argument you make is based on section 552.104 of the Government Code. Section 552.104 protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior

¹You inform our office that the system is unable to locate any Technology Works documents reflecting the Growth Fund’s fellow board members.

to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991) (holding that the system, as an entity that is authorized by both constitutional and statutory law to invest its securities, may be deemed, with regard to its investments, a competitor in the marketplace for purposes of section 552.104). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

You state that the system is “constitutionally responsible for the administration of the system and investment of funds of the system, including Growth Fund investments and other private marketplace investments[,]” citing the Texas Constitution, article XVI, §§ 67(a)(3) and (b)(1) and section 825.301(a) of the Government Code. A member of the system’s board of trustees serves on the Growth Fund’s board. Tex. Const. article XVI, § 70(c)(3). You inform us that the submitted documents contain confidential information about a company in which the Growth Fund has invested pursuant to its 1991 Trust. You explain that the system is “currently an active participant in the Growth Fund’s 1991 trust.” Therefore, you argue that the system has “an on-going interest in the performance of the 1991 Trust[,]” and in “preserving [the system’s] ability to effectively compete in the private equity marketplace.”

You assert that, if the submitted documents were disclosed, the Growth Fund would not be able to attract as many favorable investments, because companies seeking investors would be unwilling to disclose confidential information to the Growth Fund. Therefore, you argue that the Growth Fund’s ability to effectively compete against other private equity investors would be impaired, directly harming the system’s interests.

Based on your arguments and our review of the submitted records, we find that you have demonstrated that the system has specific marketplace interests; therefore, we believe that the system may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). Furthermore, we conclude that you have shown that release of the submitted documents will bring about a specific harm to the system’s marketplace interest. Accordingly, the system may withhold the submitted information under section 552.104.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

²Because we are able to make a determination under section 552.104, we do not address your argument against disclosure under section 552.101.

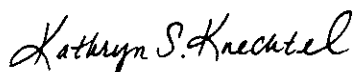
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kathryn S. Knechtel
Assistant Attorney General
Open Records Division

KSK/ljp

Ref: ID# 133654

Encl. Submitted documents

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